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No. 94-342

In the Supreme Court of the United States

OCTOBER TERM, 1994

LOUIS J. GAEV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in permitting the government to introduce into evidence the terms of its immunity and plea agreements with three of petitioner's co-conspirators, each of whom testified at trial on the government's behalf.

2. Whether the district court abused its discretion in admitting into evidence the hearsay statements of one of petitioner's co-conspirators under Fed. R. Evid. 801(d)(2)(E).

3. Whether the district court abused its discretion in permitting the government to cross-examine petitioner's expert economic witness about a price-fixing conspiracy in the same industry in an adjacent geographic market to rebut the expert's testimony that price-fixing could not exist in such a market.

4. Whether the district court clearly erred in finding that the prosecution had not indirectly commented on the petitioner's failure to testify.

5. Whether the district court abused its discretion by denying petitioner's motion for a bill of particulars.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 24 F.3d 473.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1994. A petition for rehearing was denied on May 26, 1994. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on August 24, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiring to fix prices in

violation of Section 1 of the Sherman Act, 15 U.S.C. 1. He was sentenced to 15 months' imprisonment, to be followed by three years' supervised release, and was ordered to pay a $50,000 fine. Pet. App. 22a-26a. The court of appeals affirmed. *Id.* at 1a-17a.

1. Between 1986 and 1990, petitioner, in his capacity as the Director of National Sales for the Russell-Stanley Corporation, conversed often and met periodically with executives from competing steel drum suppliers to discuss and agree to specific future prices and other terms of sale that they would quote to customers in the eastern United States. Pet. App. 2a-6a. As a result of those activities, on August 12, 1992, petitioner was indicted for conspiring to fix prices of new steel drums. *Id.* at 2a. Documentary evidence, including telephone records, expense reports, price announcements, and handwritten memoranda, corroborated the testimony of government witnesses at trial that petitioner had participated in price-fixing. *Id.* at 3a-6a.

2. On appeal, petitioner raised five challenges to his conviction.[1] The court of appeals rejected four of those challenges summarily, Pet. App. 16a n.8, and addressed in detail only petitioner's claim that the district court erred in admitting into evidence the plea agreements and immunity agreement of three co-conspirators who testified for the government at trial. The court recognized that such evidence "cannot be used as evidence of a defendant's guilt," *id.* at 8a, but determined that in this case the terms of the agreements were "introduced for proper purposes," *id.* at 16a. Those purposes were to

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[1] In addition, petitioner claimed on appeal that the district court erred in enhancing his sentence under the Sentencing Guidelines. The court of appeals rejected the claim, Pet. App. 16a n.8, and petitioner does not contest that aspect of its decision here.

rebut petitioner's attack on the credibility of the government's witnesses, to refute the suggestion that the testimony of one witness "had been influenced by government coaching," and to establish that petitioner had not been singled out for prosecution. *Id.* at 15a. Observing that the jury was given "proper limiting instructions," the court of appeals held that the district court had acted within its discretion. *Id.* at 16a. The court also held that petitioner had not been prejudiced by the evidence. *Id.* at 15a n.6.

ARGUMENT

1. Petitioner argues (Pet. 8-13) that the district court abused its discretion by admitting into evidence during the government's case-in-chief the plea agreements and immunity agreement of three of petitioner's co-conspirators who testified on the government's behalf. In petitioner's view, "no limiting instruction would be sufficient" to obviate the prejudice from such evidence. Pet. 10. The district court's proper application of accepted evidentiary principles does not warrant this Court's review.

Although the plea agreements of co-conspirator witnesses may not be introduced as evidence of a defendant's guilt, the government may for other, proper purposes introduce evidence of the witnesses' plea agreements, at least when the jury is instructed that it may consider that evidence only for the limited purpose at issue. See Pet. App. 10a-12a (citing cases from the First through the Eleventh Circuits). The court of appeals in this case explained the reasoning underlying the admissibility of co-conspirator witnesses' guilty pleas as follows:

> If a co-conspirator who appears as a witness has pleaded guilty, the trier [of] fact should know about

> the plea agreement in order properly to evaluate the witness's testimony, unless that would unduly prejudice the defendant. When a co-conspirator testifies he took part in the crime with which the defendant is charged, his credibility will automatically be implicated. Questions will arise in the minds of the jurors whether the co-conspirator is being prosecuted, why he is testifying, and what he may be getting in return. If jurors know the terms of the plea agreement, these questions will be set to rest and they will be able to evaluate the declarant's motives and credibility.

Id. at 10a (citation omitted).

In this case, the district court admitted evidence of the immunity and plea agreements as "necessary to apprise the jury of the total relationship between the witnesses and the Government and to dispel any notions that [petitioner] had been singled out for prosecution while his co-conspirators * * * had escaped with impunity." C.A. App. 87. The court instructed the jury each time evidence of a guilty plea was introduced that such evidence could be considered only in assessing the credibility of the witness and could not be considered against petitioner. Pet. App. 7a. That instruction was repeated in the court's final charge, in which the court added: "You should receive immunized testimony with caution and weigh it with great care." C.A. App. 1765.

Petitioner concedes (Pet. 9) that evidence of guilty pleas of co-conspirator witnesses is admissible under some circumstances. Moreover, he does not contend that the district court misapprehended the generally applicable legal standard or that the decision of the court of appeals conflicts with any decision of this Court or of

any other court of appeals.[2] He argues (*ibid.*), however, that the general standard for admission of evidence respecting guilty pleas should not apply where, as here, the defendant has forsworn attacks on the co-conspirator witness's credibility on the basis of the witness's guilty plea.

Petitioner's argument lacks merit both as a matter of general principle and under the specific facts of this case. As the courts of appeals have recognized, testimony by a co-conspirator on the government's behalf may raise in the minds of the jurors a question whether the witness is receiving some inducement to testify and may create an appearance that the defendant has been singled out for prosecution. Forbearance by the defendant from directly attacking the witness's credibility by virtue of his plea will not ameliorate those concerns, which are inherent in the witness's very appearance and testimony.

In this case, although petitioner stated that he would not challenge the co-conspirator witnesses on the basis of their immunity and plea agreements, in challenging those witnesses' versions of the facts, he necessarily sought to impeach their credibility, Pet. App. 15a, and thereby suggested that the witnesses had some motivation to lie. More directly, petitioner's counsel implied on cross-examination that one government witness had

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[2] Petitioner's claim (Pet. 12) that the decision in this case conflicts with the Third Circuit's own decision in *United States* v. *Thomas*, 998 F.2d 1202 (1993), provides no cause for this Court's review. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). In any event, the panel in this case correctly distinguished *Thomas* by noting that the evidence of Thomas's criminal intent was credibly contested and that the court of appeals in *Thomas* was unable to conclude that the admission of guilty plea evidence in that case had not prejudiced the defendant. Pet. App. 14a-15a.

received favorable treatment from the government in exchange for his testimony about fixing future prices, C.A. App. 1145-1148, and that the testimony of another witness was a recent fabrication influenced by government coaching, Pet. App. 15a; C.A. App. 396-397. Because petitioner's attack on the witnesses' credibility was tantamount to impeachment based on their cooperation with the government, his argument fails on its own terms.

2. Petitioner argues (Pet. 14-17) that hearsay statements of co-conspirator Daniel Milikowsky were improperly admitted, because, in petitioner's view of the record, there was no independent evidence of Milikowsky's participation in the conspiracy apart from the statements themselves. Petitioner's challenge is refuted by the record in this case.

Two government witnesses testified at trial that Milikowsky, the owner of Mid Atlantic (a rival steel drum supplier), told them that he discussed and agreed to the timing of price increase announcements with William Lima, the President of Russell-Stanley, and Ben DeBerry, a senior executive at Van Leer, another industry leader. Independent corroboration of Milikowsky's discussions with competitors at Russell-Stanley and Van Leer included: (1) the timing and similarity of the price announcements by the three companies (Pet. App. 3a-4a); (2) testimony by a former secretary at Russell-Stanley that, shortly after each call from DeBerry to Lima, Russell-Stanley would announce a price increase (C.A. App. 786-788); and (3) testimony that Milikowsky, DeBerry, and Lima were kept informed of the communications between petitioner and other conspirators and that each encouraged his subordinates to engage in these price discussions and to cooperate with their competitors, *id.* at 84-85; 659, 688-690, 807-808,

845-846, 980-981, 1004-1007, 1082. Accordingly, there was sufficient evidence, particularly when considered in conjunction with the hearsay statements themselves, see *Bourjaily* v. *United States*, 483 U.S. 171, 181 (1987), for the trial court to find that the hearsay statements had been made in furtherance of the conspiracy charged in the indictment, and that the statements were, therefore, admissible. See Fed. R. Evid. 801(d)(2)(E).

3. Petitioner argues (Pet. 17-20) that the district court erred in permitting the government to cross-examine Dr. Donald Martin, petitioner's expert economic witness, concerning a steel drum price-fixing conspiracy in an adjacent geographic market. Despite petitioner's contrary assertions, the district court properly concluded that the probative value of that cross-examination outweighed any unfair prejudicial impact. That court's determination raises no issue of general applicability warranting further review.

Dr. Martin had testified on direct that price-fixing was unlikely to exist in the eastern United States steel drum market. Martin said that he had studied the steel drum market extensively and that none of the ten general industry preconditions that he deemed "necessary" for price-fixing to occur existed in that market. C.A. App. 76-77. In rebuttal, the court permitted the government to question Martin about his knowledge of an acknowledged contemporaneous price-fixing conspiracy among new steel drum manufacturers in the adjacent east central region of the United States. The court admitted the evidence as "proper, very proper cross-examination to ask this witness what he knows about other situations that are similar to the one that he did this vast investigation and research on. If he's not familiar, the inquiry stops there. But if he is familiar, it's proper cross-examination that tests the reliability of

his theory." C.A. App. 1471. Contrary to petitioner's assertions (Pet. 17, 19), the trial court made an on-the-record finding that the probative value of that evidence outweighed its potentially prejudicial effect. C.A. App. 79.[3] There is no reason for this Court to review the district court's exercise of discretion on that matter.

4. Petitioner asserts (Pet. 21-24) that the district court erred in concluding that the prosecution had not commented on the defendant's failure to testify. The court's determination, however, is supported by the record.

Petitioner was concerned that frequent calls to and from his competitors might cause suspicion among office personnel. Accordingly, he suggested that the conspirators use an alias when calling each other. C.A. App. 368-370. Petitioner thus used the name "Bob Rogers" when calling other conspirators and they identified themselves as "Bob Rogers" when calling him. *Id.* at 368-369, 742-743, 861-862.

Since petitioner's principal defense was that his communications with competitors were for the legitimate purpose of price verification, the government pointed out to the jury in its closing that the asserted legitimacy of those communications was inconsistent with petitioner's use of an alias. C.A. App. 1589 ("Bob Rogers existed * * * [b]ecause the defendant knew that what he was doing was wrong."). Petitioner claims that, by stating that Bob Rogers "didn't appear in this

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[3] The trial court also instructed the jury as follows:

> [T]he existence of a conspiracy in another part of the country cannot be used by you, in any way, against [petitioner]. The testimony was only allowed for the limited purpose of cross-examination of the expert witness, Dr. Martin, on his opinion.

C.A. App. 1766.

courtroom * * * and * * * can't be accused of lying or forgetting or making things up to please the government," the government was indirectly commenting on petitioner's failure to testify in his own defense. Pet. 22 & n.4.

After petitioner belatedly objected to the government's references to "Bob Rogers" in the closing, the district court ruled, correctly, that those comments did not purport to equate "Bob Rogers" with petitioner and that the remarks did not constitute a direct or indirect comment on petitioner's failure to testify, but were simply "a legitimate means of undermining [petitioner's] theory of defense." C.A. App. 82. In addition, at the close of trial, the court cautioned the jury that a defendant in a criminal case has an absolute right not to testify, that no inference of any kind can be drawn from the failure to testify, and that petitioner's failure to testify could not be considered in any way in reaching a verdict. *Id.* at 1767-1768. The court's resolution of the matter was appropriate and provides no basis for this Court's review.

5. Finally, petitioner argues (Pet. 24-28) that the district court erred in denying his motion for a bill of particulars. Petitioner had demanded, among other things, a bill identifying "all customers victimized by the * * * conspiracy, including the identity of all contracts (date and customer)"; "date, time, and place of any act that [petitioner] committed"; and "identification of the individual, date, time and place when each individual purportedly issued price quotations to customers pursuant to the conspiracy." C.A. App. 35. Petitioner was not entitled to a bill of particulars that disclosed these evidentiary details, and the trial court did not abuse its discretion in denying the motion. *Wong Tai* v. *United States*, 273 U.S. 77, 82 (1927).

Petitioner claims that because the government did not tell him before trial which of the "*select few*" customers and transactions it would prove at trial, he was forced to "defend his pricing practices with over 200 customers." Pet. 26-27. Petitioner cannot claim unfair surprise, however. He was put on notice through the indictment, a voluntary bill of particulars, discovery materials produced several months before trial, and private interviews with Victor Bergwell (a co-conspirator who was one of the government's chief witnesses) that the government's case would focus on prices charged to certain key customers of mutual interest to the three companies involved in the conspiracy. Gov't Mem. in Resp. to Mot. for New Trial 29-30. Those key customers were specifically identified in the documents and grand jury materials turned over to the defense. *Ibid.* Moreover, petitioner was granted two lengthy continuances before trial (C.A. App. 27, 62) and additional continuances during trial (*id.* at 122, 1535G) to allow him time to review documents. See also Pet. 25 (acknowledging postponement of trial for additional preparation by defense). Thus, regardless of whether the government's proof at trial involved fewer customers and transactions than petitioner had anticipated, he was not prejudiced.[4]

In fact, petitioner acknowledges that the transactions he prepared to defend against included those introduced at trial. Pet. 26-27. While petitioner now claims (Pet. 28)

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[4] This case does not conflict with *United States* v. *Bortnovsky*, 820 F.2d 572, 575 (2d Cir. 1987), on which petitioner relies (Pet. 27). In this case, unlike that one, petitioner was provided with adequate notice of the particular transactions that formed the basis of the prosecution. Moreover, the court's grant of continuances permitted petitioner to meet the charges that the government made at trial; there was no unfair surprise.

that, with more preparation, he could have demonstrated that the transactions selected by the government were consistent with his economic theory of defense, the court granted petitioner a continuance to review the documents used in Dr. Martin's cross-examination, C.A. App. 1535G, and petitioner never asked for an additional continuance to permit his economist to reevaluate his theories in light of any alleged surprises presented by the narrower evidence at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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